Hong Xin Construction Sdn Bhd v Syarikat Perumahan Negara Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22C-26–07 OF 2022
SUMATHI MURUGIAH JC
2 OCTOBER 2024

Contract — Letter of undertaking — Existence of — Interpretation of terms of letter of undertaking — Words and terms in letter of undertaking to be accorded their natural and ordinary meaning — Whether letter of undertaking created privity of contract between parties — Whether parties bound by terms of letter of undertaking — Whether defendant in breach of letter of undertaking

Civil Procedure — Action — Duplicity of action — Whether claim brought in earlier suit and current suit different — Whether claim in earlier suit withdrawn with liberty to file afresh — Whether principle of judicial estoppel applicable

The defendant and Cosmic Master Development Sdn Bhd ('CMDSB') entered into a development agreement ('development agreement') and a project business collaboration agreement ('collaboration agreement') in relation to a housing project ('the project'). By way of a letter of award ('LOA'), CMDSB subsequently appointed the plaintiff as the building contractor for the execution and completion of the remaining works under the project. Subsequently, vide a letter ('CMDSB's letter'), CMDSB wrote to the defendant requesting for the issuance of its letter of undertaking in compliance with the LOA. In response, the defendant had issued a letter ('the impugned letter') alleged to be an undertaking to the plaintiff. During the course of the works, certificates of payment were issued in favour of the plaintiff. Subsequent to the certificates of payment, the plaintiff also submitted its progress claims. As a consequence of the non-payment of the certificates of payment and the progress claims, the plaintiff commenced a civil action against CMDSB and the defendant in the High Court ('JBHC Suit'). The High Court judge allowed the plaintiff's claim for a total sum of RM14,064,534.36 ('judgment'). This judgment was affirmed by the Court of Appeal. The claim against the defendant at the JBHC suit however was discontinued/withdrawn by the plaintiff prior to its conclusion with liberty to file afresh. The plaintiff contended that the impugned letter was an undertaking to pay directly to the plaintiff payments due to it under the project. As such, the defendant was bound by its promise to pay the judgment sum of RM14,064,534.36 to the plaintiff as the sum owed to the plaintiff for the works done under the project. The defendant, on the other hand, claimed that: (a) it was not privy to the LOA

between the plaintiff and CMDSB and as such, the sum of RM14,064,534.36 was claimable from CMDSB as the cause of action arose from the LOA; (b) the impugned letter was not an undertaking to pay but a letter merely allowing the payment to the plaintiff to be made using the HAD; and (c) since there was already a suit which had been filed by the plaintiff against CMDSB, the action against the defendant was a duplicity of action and therefore, an abuse of the court. The issues that arose for determination: (i) whether the plaintiff's claim through this suit was a duplicity claim with the JBHC suit and as such was judicially estopped to bring this action against the defendant; (ii) whether the impugned letter issued by the defendant to the plaintiff was a letter of undertaking; and (iii) whether the defendant was bound by the letter of undertaking.

Held, allowing the plaintiff's claim:

(1) The action brought by the plaintiff against CMDSB and the defendant (initially) was for the recovery of the certificates of payment and the progressive claims which was not paid to the plaintiff. In this case, the claim made by the plaintiff against the defendant was pursuant to the impugned letter, which the plaintiff claims was a letter of undertaking by the defendant to pay the sum certified for the works done at the project to it directly. As such, the action was clearly not a duplicity with the action filed and concluded at the JBHC suit (see paras 14–16).

(2) The judgment sum obtained through the JBHC suit was not paid to the plaintiff by CMDSB any time before or during the course of this suit. Furthermore, since the plaintiff had withdrawn the claim against the defendant at the JBHC Suit prior to any findings made by the High Court judge at the JBHC suit, this action against the defendant could not be said to be a duplicity. Through this suit, the plaintiff was merely enforcing the promise to pay via the impugned letter issued by the defendant to the plaintiff (see para 18).

(3) The principle of judicial estoppel was premised on an 'assertion of an inconsistent position in a subsequent proceeding' and sought to 'address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal'. Correspondingly, the plaintiff had not taken a position in the JBHC suit which was inconsistent with its position in this suit and neither had it benefitted from the JBHC suit but had yet proceeded in this suit to claim against the defendant. As such, the plaintiff was not judicially estopped from bringing this action against the defendant (see para 19).

(4) The legal meaning of the word 'undertaking' meant 'a promise or a pledge to do something or to refrain from doing something'. In interpreting the impugned letter, not only the contents of the letter have to be taken into consideration but also the fact that the letter was issued by the defendant

on its own letterhead to the plaintiff. Furthermore, if the objective to issue the impugned letter was merely to confirm which account would be used to pay the plaintiff as contended by the defendant, then, the words preceding 'Akaun Pemaju Perumahan (HAD')' that was '... akan dibayar terus kepada pihak tuan melalui ...' was not even necessary to be stated in the letter. Taking the letter in its entirety, with the presence of these words, it only confirmed the plaintiff's averment that the defendant had promised or undertaken to pay to the plaintiff directly via the HDA through the impugned letter, thus making it an undertaking to pay (see paras 22 & 24–25).

(5) The fact that one of the pre-conditions to commence its works pursuant to the LOA was to obtain a letter of undertaking from the defendant, confirmed that the impugned letter was the only letter issued to the plaintiff by the defendant as required under the LOA in order for the plaintiff to commence its works. There was no evidence from the defendant of any other letter issued in compliance of the preconditions of the LOA or a denial that the impugned letter was not the letter issued for the purpose as required by the LOA. Therefore, the impugned letter was indeed a letter of undertaking issued to the plaintiff promising to make direct payment via the HDA as required under the LOA (see paras 28–29)

(6) The letter of undertaking was a contract. Though the defendant's contention may be correct in so far as that the liability under the LOA was on CMDSB to pay the plaintiff, however, by the issuance of the letter of undertaking and the same being a contract, there was privity of contract created between the defendant and the plaintiff. Furthermore, by the letter of undertaking being a precondition in the LOA, issuance of the same had made the defendant privy to the LOA, ie, by promising to make direct payment to the plaintiff. The fact that the letter of undertaking was issued after and pursuant to the LOA, the letter of undertaking forms as a collateral contract entered by the parties (see paras 30 & 32–33).

(7) The fact that the defendant had produced the letter of undertaking in its own letterhead to the plaintiff directly, could be very well taken that it would have thought about the seriousness and the effect of the words stated in the contents of the said letter. Although the defendant had contended that since the collaboration agreement between the defendant and CMDSB had ended and as such this letter of undertaking was no longer valid, there was no evidence produced to show that the letter of undertaking had been revoked and/or cancelled by the defendant. As such, the defendant was to bound its obligation as per the letter of undertaking (paras 40–41).

[Bahasa Malaysia summary

Defendan dan Cosmic Master Development Sdn Bhd ('CMDSB') telah memeterai perjanjian pembangunan ('perjanjian pembangunan') dan perjanjian kerjasama perniagaan projek ('perjanjian kerjasama') mengenai projek perumahan ('projek tersebut'). Melalui surat tawaran ('ST'), CMDSB kemudiannya melantik plaintif sebagai kontraktor bangunan untuk pelaksanaan dan penyempurnaan baki kerja-kerja di bawah projek tersebut. Selepas itu, melalui surat ('surat CMDSB'), CMDSB menulis kepada defendan untuk memohon pengeluaran surat aku janjinya dengan mematuhi ST. Sebagai tindak balas, defendan telah mengeluarkan surat ('surat yang dipertikaikan') yang didakwa sebagai aku janji kepada plaintif. Semasa kerja-kerja itu dibuat, sijil pembayaran telah dikeluarkan memihak kepada plaintif. Selepas sijil pembayaran dikeluarkan, plaintif mengemukakan tuntutan progresifnya. Selepas sijil pembayaran dan tuntutan progresif projek tidak dibayar, plaintif memulakan tindakan sivil terhadap CMDSB dan defendan di Mahkamah Tinggi ('Saman JBHC'). Hakim Mahkamah Tinggi membenarkan tuntutan plaintif dengan jumlah keseluruhan sebanyak RM14,064,534.36 ('penghakiman tersebut'). Penghakiman tersebut telah disahkan oleh Mahkamah Rayuan. Tuntutan terhadap defendan pada saman JBHC bagaimanapun telah dihentikan/ditarik balik oleh plaintif dengan kebebasan untuk memfailkan semula. Plaintif berpendapat bahawa surat yang dipertikaikan itu adalah aku janji untuk membayar terus kepada plaintif untuk bayaran yang perlu dibayar di bawah projek tersebut. Oleh itu, defendan terikat dengan janjinya untuk membayar jumlah penghakiman sebanyak RM14,064,534.36 kepada plaintif sebagai jumlah yang terhutang kepada plaintif bagi kerja-kerja yang dilakukan di bawah projek tersebut. Defendan pula mendakwa bahawa: (a) mereka bukanlah pihak kepada ST antara plaintif dan CMDSB dan oleh itu, jumlah RM14,064,534.36 boleh dituntut daripada CMDSB sebagai kausa tindakan timbul dari ST tersebut; (b) surat yang dipertikaikan itu bukanlah satu aku janji untuk membayar tetapi surat semata-mata membenarkan pembayaran kepada plaintif dibuat menggunakan HAD; dan (c) oleh kerana terdapat saman yang telah difailkan oleh plaintif terhadap CMDSB, tindakan terhadap defendan adalah tindakan bertindih dan oleh itu merupakan penyalahgunaan proses mahkamah. Isu-isu yang timbul untuk penentuan adalah: (i) sama ada tuntutan plaintif melalui saman ini adalah tuntutan bertindih dengan saman JBHC dan oleh itu telah dihentikan secara kehakiman untuk tindakan ini dibawa terhadap defendan; (ii) sama ada surat yang dipertikaikan yang dikeluarkan oleh defendan kepada plaintif adalah surat akujanji; dan (iii) sama ada defendan terikat dengan surat aku janji tersebut.

Diputuskan, membenarkan tuntutan plaintif:

(1) Tindakan yang dibawa oleh plaintif terhadap CMDSB dan defendan (pada mulanya) adalah untuk mendapatkan semula sijil pembayaran dan

tuntutan progresif yang tidak dibayar kepada plaintif. Dalam kes ini, tuntutan yang dibuat oleh plaintif terhadap defendan adalah menurut surat yang dipertikaikan yang didakwa oleh plaintif merupakan surat aku janji oleh defendan untuk membayar jumlah yang diperakui untuk kerja-kerja yang dilakukan di projek itu kepadanya secara langsung. Oleh itu, tindakan itu jelas bukan tindakan bertindih dengan tindakan yang difailkan dan diputuskan di dalam saman JBHC (lihat perenggan 14–16).

(2) Jumlah penghakiman yang diperoleh melalui saman JBHC masih tidak dibayar kepada plaintif oleh CMDSB pada bila-bila masa sebelum atau semasa saman ini. Tambahan pula, memandangkan plaintif telah menarik balik tuntutan terhadap defendan di Saman JBHC sebelum sebarang penemuan yang dibuat oleh hakim Mahkamah Tinggi pada saman JBHC, tindakan terhadap defendan ini tidak boleh dikatakan sebagai bertindih. Melalui saman ini, plaintif hanya menguatkuasakan aku janji untuk membayar melalui surat yang dipertikaikan yang dikeluarkan oleh defendan kepada plaintif (lihat perenggan 18).

(3) Prinsip estoppel kehakiman berdasarkan kepada 'kedudukan yang tidak konsisten dalam prosiding berikutnya' dan untuk 'tidak membenarkan pihak bergantung kepada kedudukan yang berlainan antara mahkamah dan di tribunal yang lain'. Di dalam kes ini, plaintif tidak mengambil kedudukan dalam saman JBHC yang tidak konsisten dengan kedudukannya di dalam saman ini dan tidak juga tidak mendapat manfaat daripada saman JBHC tetapi masih meneruskan saman ini untuk menuntut terhadap defendan. Oleh itu, plaintif tidak dihalang secara kehakiman daripada membawa tindakan ini terhadap defendan (lihat perenggan 19).

(4) Maksud undang-undang bagi perkataan 'aku janji' bermaksud 'janji atau ikrar untuk melakukan sesuatu atau menahan diri dari melakukan sesuatu'. Dalam mentafsir surat yang dipertikaikan, kandungan surat itu bukan sahaja perlu diambil kira tetapi juga fakta bahawa surat itu dikeluarkan oleh defendan melalui kepala suratnya ('letterhead') sendiri kepada plaintif. Tambahan pula, sekiranya tujuan pengeluaran surat yang dipertikaikan itu semata-mata untuk mengesahkan akaun mana yang akan digunakan untuk membayar plaintif seperti yang dipertikaikan oleh defendan, maka, perkataan sebelum 'Akaun Pemaju Perumahan (HAD')' iaitu '... akan dibayar terus kepada pihak tuan melalui ...' tidak perlu dinyatakan dalam surat itu. Mengambil kira surat itu secara keseluruhannya dengan kehadiran perkataan ini ianya mengesahkan kenyataan plaintif bahawa defendan telah berjanji untuk membayar kepada plaintif secara langsung melalui HDA melalui surat yang dipertikaikan, sekali gus menjadikan pembayaran wajib dibuat (lihat perenggan 22 & 24–25).

(5) Fakta bahawa salah satu pra-syarat untuk memulakan kerja-kerjanya menurut ST adalah untuk mendapatkan surat aku janji daripada defendan mengesahkan bahawa surat yang dipertikaikan itu adalah satu-satunya surat yang dikeluarkan kepada plaintif oleh defendan seperti yang dikehendaki di bawah ST agar plaintif memulakan kerja-kerjanya. Tiada keterangan daripada defendan mengenai mana-mana surat lain yang dikeluarkan dengan mematuhi pra-syarat ST atau penafian bahawa surat yang dipertikaikan itu bukanlah surat yang dikeluarkan untuk tujuan seperti yang dikehendaki oleh ST. Oleh itu, surat yang dipertikaikan itu sememangnya surat akujanji yang dikeluarkan kepada plaintif yang berjanji untuk membuat pembayaran terus melalui HDA seperti yang dikehendaki di bawah ST tersebut (lihat perenggan 28–29).

(6) Surat aku janji itu adalah kontrak. Walaupun hujah defendan mungkin betul setakat liabiliti di bawah ST adalah pada CMDSB untuk membayar plaintif, namun dengan pengeluaran surat akujanji yang mana ianya adalah satu kontrak, maka wujudnya priviti kontrak antara defendan dan plaintif. Tambahan pula, dengan surat aku janji yang menjadi pra-syarat dalam ST, pengeluaran ST tersebut menjadikan defendan sebagai pihak di dalam kontrak untuk satu perjanjian pembayaran terus kepada plaintif. Fakta bahawa surat aku janji dikeluarkan selepas ST menjadikan surat aku janji itu dibentuk sebagai kontrak cagaran yang dimasukkan oleh pihak-pihak (lihat perenggan 30 & 32–33).

(7) Fakta bahawa defendan telah mengemukakan surat aku janji dalam kepala suratnya ('letterhead') menunjukkan keseriusan dan kesan kandungan surat tersebut. Walaupun defendan berhujah bahawa perjanjian kerjasama antara defendan dan CMDSB telah berakhir dan oleh itu surat aku janji ini tidak lagi sah, tiada keterangan yang dikemukakan untuk menunjukkan bahawa surat aku janji itu telah diketepikan dan/atau dibatalkan oleh defendan. Oleh itu, defendan adalah terikat menurut tanggungjawabnya di dalam surat aku janji tersebut (perenggan 40–41).]

Cases referred to

Concrete Engineering Products Bhd v Greengroup Engineering Sdn Bhd & Anor [2018] MLJU 1898, HC (refd)

Dato' Shazryl Eskay bin Abdullah v Merong Mahawangsa Sdn Bhd & Anor [2014] 3 MLJ 892, CA (refd)

Hiap Huat Pottery (S) Pte Ltd v TV Media Pte Ltd [1999] 1 SLR 14, CA (refd)

Kumpulan Darul Ehsan Bhd v Mastika Lagenda Sdn Bhd [2017] 4 MLJ 561, FC (refd)

Lew On @Lew Tee Yee v Mohammad bin Muhamed Avvuu & Ors (Setiamas Sdn Bhd & Anor, third parties) [2021] MLJU 2787, HC (refd)

Malayan Banking Bhd v Government of Malaysia [2023] MLJU 2015, HC (refd)
NV Bina Sdn Bhd v Magna Park Sdn Bhd [2016] 9 MLJ 313, HC (refd)
Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors [2017] MLJU 273, CA (refd)
Tan Sri Rozali bin Ismail v Abdul Hadi bin Hamad & Anor [2023] 9 MLJ 346, HC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

James P Monteiro (TJ Goh & Co) for the plaintiff.
Syed Fadzil Alhabshi (with Aawaisha Pillai) (Sidek Teoh Wong & Dennis) for the defendant.

Sumathi Murugiah JC:

INTRODUCTION

[1] This is an action brought against the defendant, being the employer, based on a letter dated 16 August 2018 (the impugned letter) alleged to be an undertaking issued to the plaintiff by the defendant.

[2] Relying on the impugned letter, the plaintiff sought for the sum of RM14,064,534.36 to be paid by the defendant. This sum is the judgment sum obtained through the Johor Bahru High Court vide Civil Suit No JA-22C-4–06 of 2019 ('JBHC Suit') by the plaintiff against Cosmic Master Development Sdn Bhd ('CMDSB').

BRIEF BACKGROUND

[3] The defendant and CMDSB entered into a development agreement dated 22 January 2007 ('development agreement') and a project business collaboration agreement dated 25 July 2011 ('collaboration agreement') ('agreements') in relation to a project known as 'Cadangan Pembangunan Rumah Pangsa Mampu Milik Sebanyak 972 Unit Serta Kemudahan Yang Terdiri Daripada 1 Unit Pencawang Stesyen Utama (SSU), 4 Unit Pencawang TNB, 1 Unit Surau, 1 Unit Pondok Pengawal, 6 Unit Pusat Pengumpulan Sampah Di Atas Lot 189189, 189190 and 189191 Mukim Plentong, Johor Bahru Untuk Tetuan Syarikat Perumahan Negara Berhad' ('the project').

[4] Based on the collaboration agreement, the defendant had assigned all rights and responsibilities over the project to CMDSB and for which the defendant had executed a limited power of attorney in favour of CMDSB.

[5] By way of a letter of award dated 24 April 2018 ('LOA'), CMDSB subsequently appointed the plaintiff as the (building) contractor for the execution and completion of the remaining works under the project. The LOA incorporated the Articles of agreement of PAM Contract 2006 (Without Quantities) and the Conditions of Contract of PAM Contract 2006 (Without Quantities). The plaintiff's appointment under the LOA was however not subject to the development agreement and/or collaboration agreement.

[6] By way of a letter dated 30 April 2018 ('CMDSB's letter dated 30 April 2018'), CMDSB wrote to the defendant requesting for the issuance of its letter of undertaking in compliance to cl 2.0 and cl 3.4 of the LOA.

[7] The defendant had subsequently issued the impugned letter:

SPNB

Ruj. Kami : SPNB/BPP/TEKNIKAL/PLIKAL/COSMIC/TAMKA(15)/19
Tarikh : 4 hb Jun 2018

Cosmic Master Development Sdn. Bhd.
No. 18, Jalan Permas Jaya 12/14,
Bandar Baru Permas Jaya,
81750 Masai,
Johor Darul Takzim.

Tuan,

CADANGAN PEMBANGUNAN PERUMAHAN MAMPU MILIK DI GM 864 LOT 1158, GM 865 LOT 1991 DAN GM 785 LOT 2186, MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR DARUL TAKZIM (TAMAN SERI MOLEK PERDANA)
- Penjanjian 'Project Business Collaboration' Di antara SPNB Dan Cosmic Master Development Sdn Bhd Bertarikh 25 Julai 2011
- *Pembayaran Terus Kepada Hong Xin Construction Sdn Bhd (HXCSB)*

Merujuk kepada perkara tersebut di atas, surat daripada pihak tuan ruj.: CMD/SPNB/052018/0004 yang bertarikh 18 Mei 2018 adalah dengan ini dirujuk.

2. Pihak kami ingin mengesahkan dan menyatakan bahawa permohonan pihak tuan agar bayaran terus dapat dibuat kepada pihak Hong Xin Construction Sdn Bhd (HXCSB) bagi kemajuan kerja melalui Akaun Pemaju Perumahan (HDA) adalah dipersetujui pihak kami.

Sekian.

'Perumahan Untuk Semua'

AMIRUDDIN SHAH HEZAN SHAH
KETUA BAHAGIAN PENGURUSAN PROJEK

[8] During the course of the works, certificates of payment Nos 1, 2 and 3 ('certificates of payment') were issued in favour of the plaintiff, however, no payments were made to the plaintiff for the same. Subsequent to the certificates

of payment, the plaintiff had also submitted its progress claims Nos 4, 5, 6 and 7 ('progress claims'), which were not certified by CMDSB. Although there are no contemporaneous documents whatsoever from the defendant and/or CMDSB, disputing that works had been carried out for any of the certificates of payment or the progress claims, no payments were made to the plaintiff.

[9] As a consequent to the non-payment of the certificates of payment and the progress claims, the plaintiff had commenced a civil action against CMDSB and the defendant through the JBHC Suit. Upon the conclusion of the JBHC Suit, the learned High Court judge on 25 October 2020 ('judgment') allowed the plaintiff's claim based on Payment Certificates Nos 1, 2 ,3 and Payment Claim No 4 for a total sum of RM14,064,534.36. This judgment was affirmed by the Court of Appeal vide Civil Appeal No J-02(c)(W)-1821–11 of 2020.

[10] The claim against the defendant at the JBHC Suit however was discontinued/withdrawn by the plaintiff on 1 July 2019 prior to its conclusion with liberty to file afresh. It is the plaintiff's contention that the impugned letter is an undertaking to pay directly to the plaintiff payments due to it under the project. As such, the defendant is bound by its promise to pay the judgment sum of RM14,064,534.36 to the plaintiff as sum owed to the plaintiff for the works done under the project.

[11] The defendant on the other hand claims that it is not privy to the LOA between the plaintiff and CMDSB and as such, the sum of RM14,064,534.36 is claimable from CMDSB as the cause of action arose from the LOA. It is also the defendant's contention that the impugned letter is not an undertaking to pay but a letter merely allowing the payment to the plaintiff to be made using the HDA.

[12] Since there was already a suit which had been filed by the plaintiff against CMDSB, it is the defendant's contention that this action against it is a duplicity of action and therefore, an abuse of the court.

ISSUES

[13] Issues which have to be considered by this court arising from both parties' case are as follows:

(a) whether the plaintiff's claim through this suit is a duplicity claim with the JBHC Suit and as such is judicially estopped to bring this action against the defendant;

(b) whether the impugned letter issued by the defendant to the plaintiff is a letter of undertaking; and

(c) if so, whether the defendant is bound by the letter of undertaking dated 16 August 2018.

FINDINGS OF THE COURT

Whether the plaintiff's claim through this suit is a duplicity claim with the JBHC Suit and as such is judicially estopped to bring this action against the defendant

[14] The action brought by the plaintiff against CMDSB and the defendant (initially) was for the recovery of the certificates of payment and the progressive claims which was not paid to the plaintiff. The JBHC Suit had determined both liability and quantum against CMDSB (by which time the plaintiff had withdrawn its claim against the defendant through the JBHC Suit).

[15] In this case, the claim made by the plaintiff against the defendant is pursuant to the impugned letter, which the plaintiff claims is a letter of undertaking by the defendant to pay the sum certified for the works done at the project to it directly.

[16] As such, this action is clearly not a duplicity with the action filed and concluded at the JBHC Suit.

[17] This court accepts and reiterates the reference made by the plaintiff to the case of *Tan Sri Rozali bin Ismail v Abdul Hadi bin Hamad & Anor* [2023] 9 MLJ 346, where the High Court explained what amounts to a duplicity of proceedings:

> [76] Therefore, there is a clear duplicity of proceedings. It is undesirable *that two different courts are asked to decide on the same or similar issues* (see *Oversea-Chinese Banking Corporation Ltd v National Union of Bank Employees & Ors* [1985] 1 MLJ 439; *Wan Hamzah J and Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ 184 (SC)).
>
> [77] Therefore, on this ground of duplicity of proceedings, this appeal should also be dismissed. (Emphasis added)

[18] It is an undeniable fact that the judgment sum obtained through the JBHC Suit was not paid to the plaintiff by CMDSB any time before or during the course of this suit. Furthermore, since the plaintiff had withdrawn the claim against the defendant at the JBHC Suit prior to any findings made by the learned High Court judge at the JBHC Suit, this action against the defendant cannot be said to be a duplicity. Through this suit, the plaintiff is merely enforcing the promise to pay via the impugned letter issued by the defendant to the plaintiff.

[19] As to whether the plaintiff is judicially estopped to bring this action, as submitted by the plaintiff, the principle of judicial estoppel is premised on an 'assertion of an inconsistent position in a subsequent proceeding' and seeks to 'address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal' as established in the case of *Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] MLJU 273. Correspondingly, the plaintiff has not taken a position in the JBHC Suit which is inconsistent with its position in this suit and neither had it benefited from the JBHC Suit but had yet proceeded in this suit to claim against the defendant. As such, the plaintiff is not judicially estopped to bring this action against the defendant.

Whether the impugned letter issued by the defendant to the plaintiff is a letter of undertaking

[20] Undisputedly, the impugned letter is issued by the defendant in the plaintiff's name directly. The letter from the defendant was a requirement to be obtained in the plaintiff's name pursuant to cl 2.0 of the LOA:

2.0 CONTRACT PERIOD

The Works shall be completed within **Seven (7) months** from the Commencement Date of the Works. The commencement date shall be advice by the Architect and subject to the following:-

a) Letter of Undertaking from Syarikat Perumahan Negara Berhad (SPNB) to direct disbursement the certified progress payment to the Hong Xin Construction Sdn Bhd;

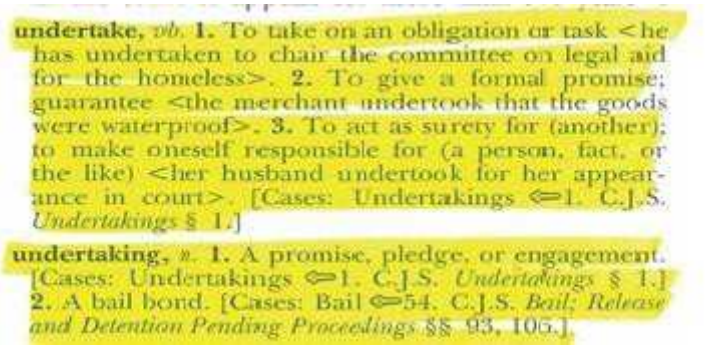
b) Letter of approval in granting the banking facilities ie: Contract Financing from OCBC Bank(M) Berhad or AMBank (M) Berhad.

10

[21] It is the defendant's argument that the impugned letter is not an undertaking as the word synonym to 'undertaking' or 'undertake' translated in Bahasa Malaysia as 'akujanji' does not appear anywhere in the said letter.

[22] The legal meaning of the word 'undertaking' means 'a promise or a pledge to do something or to refrain from doing something' in accordance to the dictionary meaning. According to the *Black's Law Dictionary* (8th Ed) the words 'undertaking' and 'undertake' are as follows:

A



undertake, *vb.* **1.** To take on an obligation or task <he has undertaken to chair the committee on legal aid for the homeless>. **2.** To give a formal promise; guarantee <the merchant undertook that the goods were waterproof>. **3.** To act as surety for (another); to make oneself responsible for (a person, fact, or the like) <her husband undertook for her appearance in court>. [Cases: Undertakings ⇐1. C.J.S. *Undertakings* § 1.]

undertaking, *n.* **1.** A promise, pledge, or engagement. [Cases: Undertakings ⇐1. C.J.S. *Undertakings* § 1.] **2.** A bail bond. [Cases: Bail ⇐54. C.J.S. *Bail; Release and Detention Pending Proceedings* §§ 93, 105.]

B

C

[23] Based on the dictionary meaning, a promise or a pledge to do something or to refrain from doing something amounts to an undertaking, as such, in the absence of the usage of the word 'akujanji' (translated in Bahasa Malaysia), the question here is, whether there was a promise made in this letter to the plaintiff by the defendant.

D

[24] This court does not accept to the defendant's argument that the impugned letter is merely to agree that the payment to the plaintiff will be paid through the HDA and as such is not an undertaking. This is because, if the defendant's version is correct then it makes no sense that the letter is issued to the plaintiff (being the payee) and not to CMDSB (being the payor) as alleged. In interpreting the impugned letter, this court is of the view that not only the contents of the letter have to be taken into consideration but also the fact that the letter was issued by the defendant on its own letterhead to the plaintiff.

E

F

[25] Furthermore, if the objective to issue the impugned letter is merely to confirm which account will be used to pay the plaintiff as contended by the defendant, then, the words preceding 'Akaun Pemaju Perumahan (HDA)' that is '... akan *dibayar terus* kepada pihak tuan melalui ...' is not even necessary to be stated in this letter. Taking the letter in its entirety, with the presence of these words, it only confirms the plaintiff's averment that the defendant has promised or undertaken to pay to the plaintiff directly via the HDA through this letter dated 16 August 2018, thus making it an undertaking to pay.

G

H

[26] Furthermore, the impugned letter had made reference to a letter issued by the defendant to CMDSB dated 4 June 2018 ('letter dated 4 June 2018'), however, this letter which was referred to had not been produced during trial in order for this court to know the contents of the same. Neither did the defendant call the person or persons who had personal knowledge of the contents of the letter dated 4 June 2018 or the impugned letter to give evidence in court on behalf of the defendant.

I

[27] It cannot be denied that the letter dated 4 June 2018 referred to in the impugned letter would surely shine some light as to the reason for the issuance of the impugned letter by the defendant. Due to the non-production of the same and the failure to call any witness who had personal knowledge of the matters dealt with at that material time in relation to the LOA and the required letter of undertaking including the issuance of the impugned letter, a presumption that revelation of the same would be unfavourable to the defendant can be arrived at, hence, this court invokes s 114(g) of the Evidence Act 1950 against the defendant.

> Section 114 (g) Court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case ...
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it; ...

[28] Additionally, the fact that one of the pre-conditions to commence its works pursuant to the LOA is to obtain a letter of undertaking from the defendant only confirms that the impugned letter being the only letter issued to the plaintiff by the defendant as required under the LOA in order for the plaintiff to commence its works. There is no evidence from the defendant of any other letter issued in compliance of the pre-conditions of the LOA or a denial that the impugned letter is not the letter issued for the purpose as required by the LOA.

[29] Therefore, this court is of the view that the impugned letter is indeed a letter of undertaking issued to the plaintiff promising to make direct payment via the HDA as required under the LOA ('letter of undertaking').

Whether the defendant is bound by the letter of undertaking

[30] To begin with, this court is of the view that the letter of undertaking is a contract (see cases: *Concrete Engineering Products Bhd v Greengroup Engineering Sdn Bhd & Anor* [2018] MLJU 1898; *NV Bina Sdn Bhd v Magna Park Sdn Bhd* [2016] 9 MLJ 313).

[31] It is the defendant's contention that there is no obligation to pay the plaintiff as there is no privity of contract between the plaintiff and the defendant. The liability established at the JBHC Suit is against CMDSB and as such, the plaintiff's recourse is against CMDSB and not the defendant.

[32] Though the defendant's contention may be correct in so far as that the liability under the LOA is on CMDSB to pay the plaintiff, however, by the issuance of the letter of undertaking and the same being a contract, there is privity of contract created between the defendant and the plaintiff. Furthermore, by the letter of undertaking being a pre-condition in the LOA, issuance of the same had made the defendant privy to the LOA ie by promising to make direct payment to the plaintiff.

[33] The fact that the letter of undertaking is issued after and pursuant to the LOA, this court finds that the letter of undertaking forms as a collateral contract entered by the parties as per the case of *Malayan Banking Bhd v Government of Malaysia* [2023] MLJU 2015, where Khadijah Idris J had referred to the Singapore case of *Hiap Huat Pottery (S) Pte Ltd v TV Media Pte Ltd* [1999] 1 SLR 14 in relation to collateral contract:

> [68] In the case cited by the plaintiff *Hiap Huat Pottery (S) Pte Ltd v TV Media Pte Ltd* [1969] 1 SLR 14 the Court held a collateral contract existed as a supplementary contract to a main contract which had already been in existence. It was also held that the main contract may be between the same parties as the collateral contract or it may be between a third party and one of the parties to the collateral contract.
>
> [69] In this instant case, the evidence adduced shows the Shipbuilding Contract which was between defendant and NGV Tech was the main contract while the collateral contract was between plaintiff and the defendant that the Shipbuilding Contract was to be continued subject to the continued funding from the plaintiff which in turn is subject to, critically, the waiver of the liquidated damages.
>
> [70] Thus the defendant's contention that the plaintiff is not a party to the Shipbuilding Contract is immaterial and irrelevant.

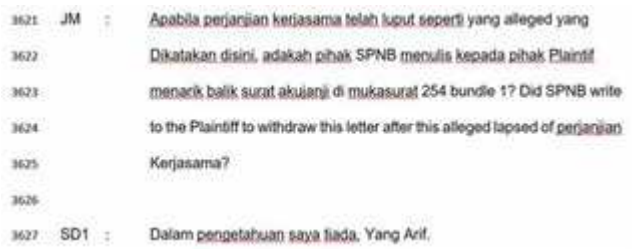
[34] The court also refers to the case of *Lew On @Lew Tee Yee v Mohammad bin Muhamed Avvuu & Ors (Setiamas Sdn Bhd & Anor, third parties)* [2021] MLJU 2787, where Awg Armadajaya Awg Mahmud JC held that:

> [28] The exceptions to the Common Law doctrine of privity of contract allow rights to third parties and some impositions of obligations. These are:
>
> i. Collateral Contracts (between the third party and one of the contracting parties).

[35] Furthermore, the plaintiff's action against the defendant is for the breach of the letter of undertaking and not the LOA. The only condition set in the letter of undertaking is for direct payments to be made to the plaintiff for the certified progressive claims. In this case, although there were progressive claims that were uncertified but by virtue of the judgment of the JBHC Suit, there was a judicially certified sum ie RM14,064,534.36 payable to the plaintiff.

[36] The defendant had also additionally contended that the payment which is to be made via the HDA to the plaintiff is subject to there being balance in the said HDA. It was established during cross examination of the defendant's sole witness that the letter of undertaking does not contain any language or words that subjects the letter of undertaking to the agreements and that the payments were to be made to the plaintiff via the HDA provided there was balance in the said account.

> 40.5 Further still, the defendant's sole witness confirmed that notwithstanding the expiration of the collaboration agreement on 31.3.2019, the defendant did not at any material time withdraw the letter of undertaking issued to the plaintiff.'



3621	JM	:	Apabila perjanjian kerjasama telah luput seperti yang alleged yang
3622			Dikatakan disini, adakah pihak SPNB menulis kepada pihak Plaintif
3623			menarik balik surat akujanji di mukasurat 254 bundle 1? Did SPNB write
3624			to the Plaintiff to withdraw this letter after this alleged lapsed of perjanjian
3625			Kerjasama?
3626			
3627	SD1	:	Dalam pengetahuan saya tiada, Yang Arif.

[37] This court finds that this is an unfounded argument by the defendant as clearly there is no such conditions stated in the letter of undertaking. Whether there is any balance in the HDA or not is irrelevant as far as the obligation to make direct payment pursuant to the letter of undertaking is concerned.

[38] Again, this court finds that the words **'**akan dibayar terus**'** are not necessary to be included if the intention is only to state from which account the payment is to be made. In fact, the word 'terus' which translates to 'direct' can only mean 'direct payment will be made', in this case, by the defendant.

[39] This court is minded of the case of *Kumpulan Darul Ehsan Bhd v Mastika Lagenda Sdn Bhd* [2017] 4 MLJ 561, as highlighted by the plaintiff where the Federal Court held that:

> [23] In considering Question 1 it must be taken into account what the parties agreed to in the SSA. In this case there were two crucial matters agreed upon, namely, the option right and the waiver provision. As such those terms must be considered in the light of the legal principles, to wit, that *the sanctity of a contract must be preserved and that it is not the function of the court to rewrite the agreed terms in a contract* (see *The Pacific Bank Bhd (sued as guarantor) v Kerajaan Negeri Sarawak* [2014] 6 MLJ 153).

(Also see: *Dato' Shazryl Eskay bin Abdullah v Merong Mahawangsa Sdn Bhd & Anor* [2014] 3 MLJ 892 — submitted by the plaintiff.)

[40] It is this court's view that the very fact that the defendant had produced the letter of undertaking in its own letterhead to the plaintiff directly, it can be very well be taken that it would have thought about the seriousness and the effect of the words stated in the contents of the said letter.

[41] Although the defendant had contended that since the collaboration agreement between the defendant and CMDSB had ended and as such this letter of undertaking is no longer valid, there is no evidence produced to this court to show that the letter of undertaking has been revoked and/or cancelled by the defendant. As such, this court is of the considered view that the defendant is bound its obligation as per the letter of undertaking.

CONCLUSION

[42] Based on all the evidences produced before this court, in the upshot, this court allows the plaintiff's claims and the defendant is ordered to pay to the plaintiff as follows:

(a) the sum of RM14,064,534.68;

(b) interest at 5%pa on the sum of RM14,064,534.68 from 16 August 2018 until the date of this judgment;

(c) interest at 5%pa on the sum of RM14,064,534.68 from the date of this judgment until full realisation; and

(d) cost of RM40,000 subject to allocatur fee.

Claim allowed.

Reported by K Selvaraju